UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
SUBREGION 24

ASOCIACIÓN DE EMPLEADOS DEL ESTADO LIBRE ASOCIADO DE PUERTO RICO Respondent -and- UNIÓN INTERNACIONAL DE TRABAJADORES DE LA INDUSTRIA DE AUTOMÓVILES, AEROESPACIO E IMPLEMENTOS AGRÍCOLAS, U.A.W., LOCAL 1850 Charging Party	Case Nos. 12-CA-218502 -and- 12-CA-232704

CHARGING PARTY UAW'S BRIEF IN RESPONSE TO RESPONDENT'S EXCEPTIONS

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TO THE HONORABLE NATIONAL LABOR RELATIONS BOARD:

COMES NOW the Charging Party Unión Internacional de Trabajadores de la Industria de Automóviles, Aeroespacio e Implementos Agrícolas, U.A.W., Local 1850 (the "Union"), and very respectfully submits its Brief in response to Respondent Asociación de Empleados del Estado Libre Asociado de Puerto Rico's ("AEELA") exceptions to the Administrative Law Judge's ("ALJ") Decision (the "Decision").

I. PRELIMINARY STATEMENT

AEELA takes exception to the ALJ's Decision, through which the ALJ concluded that AEELA *inter alia* on two occasions unilaterally reduced the bargaining unit's Christmas bonus pay and failed to follow the contractual rate established as past practice. Therefore, the ALJ ordered AEELA to cease and desist from this practice, rescind these unilateral changes, and make the bargaining unit whole.

AEELA alleges that its unilateral reduction of the Christmas Bonus is lawful, based on its interpretation of the parties' Collective Bargaining Agreement (the "CBA"). To wit, AEELA argues that, although the CBA and its predecessors provided for continuous, yearly increases of Christmas Bonuses, the CBA's mention of specific years meant AEELA could reduce future Christmas Bonuses to the legal baseline. However, as the Union alleged and the ALJ correctly determined, AEELA had to preserve the status quo at the time—payment of the Christmas Bonuses at the latest yearly increment—and its failure to do so justifies the ALJ's Decision.

II. STATEMENT OF THE CASE

This matter arose *inter alia* from AEELA's failure to pay Christmas Bonuses pursuant to the CBA and the parties' past practice. Specifically, the parties had engaged in collective bargaining since at least March 19, 1992 and have successfully negotiated various collective bargaining agreements. The latest such agreement (the "CBA") was effective from July 1, 2013 through June 30, 2017. Although the Agreement had expired by the time of the relevant timeframe, the parties had extended this Agreement through January 10, 2019.[1]

Where relevant, Article 41 of the Agreement recognized employees' right to a Christmas Bonus pursuant to P.R. Laws Ann. tit. 29, § 501 ("Section 501"), subject to certain modifications. Normally, applicable law caps Christmas Bonuses at $600.00. However, the modifications in the CBA (and each of its predecessors) increased the amount of the Christmas bonuses year-over-year for every year during which the CBA and its predecessors were in effect. In other words, the bargaining unit would be paid Christmas Bonuses well above the legal baseline while the CBA and its predecessors were in effect.

By 2016, the CBA required that the Christmas Bonus AEELA would pay its employees amount to 8.65% of employee's salaries, with a $40,000.00 salary cap. In more practical terms, the parties bargained that the legal baseline of $600.00 be increased to up to $3,460.00, depending on each employee's wages.

[1] The Agreement was not in effect from December 1, 2017 to December 20, 2017.

This increase to the Christmas Bonuses was not a practice isolated to the CBA at issue but had instead been part and parcel of the parties' agreements for at least a decade. That is, since at least 2002, the parties' collective bargaining agreements had stipulated a modified Christmas Bonus well above the legal baseline. These bonuses were all customarily paid during the week of Thanksgiving.

Notwithstanding, during the 2017 Holiday season, AEELA did not pay out Christmas Bonuses at this modified rate, but rather at the legal baseline. Furthermore, AEELA did not pay the Christmas Bonus during the customary timeframe—during the week of Thanksgiving—instead doing so on December 15, 2017. Conveniently for AEELA, the CBA was not in effect on December 15, 2017, but had been in effect during the week of Thanksgiving 2017.

Therefore, AEELA argued that it need only pay the Christmas Bonus at the legal baseline, since there was no CBA in effect at that time, and because the CBA did not provide for an increase from 2016 to 2017. However, AEELA decided to ignore the fact that the 2016 Christmas Bonus had become the status quo, such that it had to pay Christmas Bonuses pursuant to these terms and not in accordance with the legal baseline.

If the above were not enough, by the 2018 Holiday season, the parties still had not negotiated the Christmas Bonus provisions of the successor to the CBA. However, an impasse had not yet been declared. Notwithstanding, AEELA yet again paid Christmas Bonuses at the legal baseline and not pursuant to the CBA. Indeed, the stipulations of fact on the record would show that AEELA never claimed a financial hardship in meeting the CBA's Christmas Bonuses. Instead, and as the ALJ correctly determined, their acts

constituted a unilateral and therefore, illegal modification of the parties' CBA. Moreover, AEELA's contractual defense is nothing more than a hollow excuse, in light of the Board's case law.

Deeming this to be the case, the ALJ—relying on a stipulated record—issued a Decision finding AEELA to have unilaterally modified the bargaining unit's pay, because it had paid the 2017 and 2018 Christmas Bonuses at the legal baseline, instead of at the 2016 amount. Therefore, it ordered AEELA to cease and desist from this practice, rescind these unilateral changes, and make the bargaining unit whole.

Notwithstanding, on December 4, 2019, AEELA filed exceptions to the ALJ's Decision. AEELA took exception with the ALJ's Decision that it unilaterally reduced the Christmas Bonuses for 2017 and 2018. In support thereof, AEELA took issue with the ALJ's holding that the Christmas Bonuses were subject to past practice, such that it relied on a "dynamic status quo" theory. Moreover, AEELA was unsatisfied with the ALJ's waiver analysis or with the ALJ's determination that AEELA lacked a sound arguable basis in the CBA to modify its extant terms and conditions. Lastly, AEELA took issue with the ALJ's analysis of certain case law, and the relief granted by the ALJ in the decision.

III. ARGUMENT

a. The ALJ correctly determined that the payment of Christmas Bonuses was subject to past practice.

The parties have already stipulated that AEELA had over a decade-long past practice of paying the bargaining unit a Christmas Bonus that exceeded the legal baseline,

through various CBAs. This practice was further preserved in the CBA here at issue. The Union's charge turns in part on AEELA's failure to continue with this past practice, instead "turning heel" and paying a lesser amount that has never been subject to the parties' decade-long bargaining.

In fact, the ALJ correctly determined that past practice—the payment of prior Christmas Bonuses at above the legal baseline—applied. In so holding, the ALJ correctly determined that past practice occurs with "such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis." Philadelphia Coca-Cola Bottling Co., 340 N.L.R.B. 349, 353-354 (2003), enf'd 112 F. App'x 65 (D.C. Cir. 2004). This decision was based on payment of Christmas Bonuses for over a decade, pursuant to formulas included in the CBA and its predecessors, based on earnings for the same timeframe of the year in which the bonus was paid, and meted out to the bargaining unit during the same timeframe, i.e. the week of Thanksgiving. An over a decade-long practice cannot be considered anything *but* past practice.

However, and corollary hereto is the fact that AEELA also takes an exception to the ALJ's determination that these Christmas Bonus payments were the status quo. The ALJ correctly determined that the terms of the CBA remained the status quo, such that AEELA had to pay out Christmas Bonuses at the level set in 2016. See Richfield Hospitality, Inc., 368 N.L.R.B. No. 44, slip op. at 3 (2019). AEELA argues that the 2016 Christmas Bonus did not become the *status quo*, based on an erroneous reading of the Board's opinion in P.G. Pub. Co., 368 N.L.R.B. No. 41 (2019).

In P.G. Pub. Co., the Board dealt with a clause which required annual increases in contributions to employees' welfare fund. Id., slip op. at 1. In determining what amounted to the status quo, the Board held that the practice of annual increases could not be considered a status quo. Id., slip op. at 3. Instead, the status quo became the contribution for the last year during which the parties' agreement was in effect. That is precisely what the Union has asked for and what the ALJ granted: payment of Christmas Bonuses pursuant to the 2016 formula, which was the last formula set forth within the CBA. Therefore, AEELA's protestations are baseless.

b. The ALJ's waiver analysis is in accordance with case law.

AEELA alleges that, when the ALJ determined that the Union did not waive its right to bargain on the Christmas Bonuses, it applied the "clear and unmistakable" standard abrogated and replaced by the "contract coverage" standard in MV Transp. Inc., 368 N.L.R.B. No. 66 (2019). However, AEELA misconstrues the record at hand, which categorically demonstrates that the "contract coverage" standard, as applied hereto, would not result in waiver. Therefore, this exception is unwarranted, because it does not change the end result.

In MV Transp. Inc., the Board held that it would adopt the contract coverage test, as follows:

> [T]he Board will assess the merits of this defense by undertaking the more limited review necessary to determine whether the parties' collective-bargaining agreement covers the disputed unilateral change (or covered it, if the disputed change was made during the term of an agreement that has since expired). In doing so, the Board will give effect to the plain meaning of the relevant contractual language, applying ordinary principles of

> contract interpretation; and the Board will find that the agreement covers the challenged unilateral act if the act falls within the compass or scope of contract language that grants the employer the right to act unilaterally. In applying this standard, the Board will be cognizant of the fact that a collective bargaining agreement establishes principles to govern a myriad of fact patterns, and that bargaining parties cannot anticipate every hypothetical grievance and address it in their contract. Accordingly, we will not require that the agreement specifically mention, refer to or address the employer decision at issue. Where contract language covers the act in question, the agreement will have authorized the employer to make the disputed change unilaterally, and the employer will not have violated Section 8(a)(5).
>
> If an agreement does not cover a disputed unilateral change, the Board will next consider whether the union waived its right to bargain over the change. In such cases, the Board will ascertain whether the union surrendered the opportunity to create a set of contractual rules that bind the employer, and instead ceded full discretion to the employer on that matter. Under those circumstances, the waiver must be "clear and unmistakable." Accordingly, if the contract coverage standard is not met, the Board will continue to apply its traditional waiver analysis to determine whether some combination of contractual language, bargaining history, and past practice establishes that the union waived its right to bargain regarding a challenged unilateral change.

Id., slip op. at 11-12 (internal citations omitted).

As can be seen above, the "contract coverage" test contains two prongs. First, the Board must determine whether the disputed is covered by the terms of the CBA. Second, and if a contract *does not* cover the dispute, the Board falls back on the "clear and unmistakable" standard. Because there was no CBA in effect at the time of payment of the 2017 Christmas Bonuses, the ALJ correctly determined that the "clear and unmistakable" standard applied.

In order to assess whether waiver occurred, the ALJ looked for guidance to Wilkes-Barre Gen. Hosp. Co., 362 N.L.R.B. 1212 (2015), which dealt with the expiration of a CBA and a question of whether benefits therein enshrined would continue extant past this expiration. To answer this question, the Board found that the employer unilaterally decided to stop paying longevity-based wage increases after the parties' CBA in that case expired. Id. at 1216. The Board concluded that this unilateral act was illegal, because the CBA did not contain any language stating what should occur with these increases when the contract expired. Id. at 1217. Therefore, the employer had a statutory obligation to continue to apply this contractual provision. Id.

The same issue occurred here: there is no provision in the CBA that would expressly result in a reduction of Christmas Bonuses to the legal baseline upon the instrument's expiration. Moreover, as argued above, the record shows a decade-long past practice of conferring Christmas Bonuses at a rate higher than the legal baseline. Hence, any inaction by the Union could not be construed as a waiver of these benefits upon the CBA's expiration.[2]

c. The ALJ rightfully determined that AEELA did not have a sound arguable basis in the CBA to modify existing terms and conditions.

AEELA takes issue with the ALJ's conclusion that the former's unilateral modification of the Christmas Bonuses has a basis in the CBA. In these types of cases, the

[2] Additionally, and as the ALJ correctly determined, the CBA's "zipper clause" cannot be construed as a waiver. See Viejas Band of Kumeyaay Indians, 366 N.L.R.B. No. 113, slip op. at 1 n.1 (2018). Indeed, AEELA concedes that the "zipper clause" is immaterial to this controversy.

Board must evaluate whether the matter at hand had been subject to bargaining on a prior occasion and, if so, the Board then must see whether the defense has a sound arguable basis in the CBA. Bath Marine Draftsmen's Ass'n v. NLRB, 475 F.3d 14, 25 (1st Cir. 2007). This inquiry has two prongs: (1) whether the employer's interpretation of its contractual rights has a sound arguable basis in the contract and (2) whether the employer was motivated by anti-union animus, acting in bad faith, or in any way seeking to undermine the union's status as a collective bargaining representative. Id. at 22 (citing Westinghouse Elec. Corp., 313 N.L.R.B. 452 (1993), enforced sub nom., Salaried Employees Ass'n v. NLRB, 46 F.3d 1126 (4th Cir.1995)). In this exercise, the Board must also find a particular contractual term which the employer decided to modify. Bath Marine Draftsmen's Ass'n, 475 F.3d at 22 n.5 (citing Milwaukee Spring Div., 268 N.L.R.B. 601, 602 (1984)).

The ALJ correctly determined that there is no basis in the CBA for AEELA to pay the baseline rate at the legal minimum, instead of at the rate agreed to by the parties. Moreover, AEELA's acts, done in the midst of negotiating a successor CBA, were made to undermine the Union before the bargaining unit.

i. AEELA's acts are unsupported by the CBA's text.

AEELA claims that it could pay the Christmas Bonus at the legal baseline, alleging that the CBA provided for yearly increases to these bonuses, solely for certain years. However, AEELA's claims run counter to the parties' continued practices and can in no way be considered a plausible reading of the CBA. For starters, the parties had, for a decade, agreed to Christmas Bonuses above the legal baseline. Instead, from 2002 to 2016, these bonuses have been paid at a higher rate. Therefore, the parties' continuous increases

to Christmas Bonuses would entail payment of Christmas Bonuses at a rather higher than the legal baseline. See United Steelworks of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 581-82 (1960) (concluding that "the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.")

Further, any interpretation by AEELA to the contrary would run afoul of applicable law. As noted above, when a collective bargaining agreement expires, that agreement's terms and conditions of employment subsist until a successor agreement is negotiated, thereby preserving the status quo. Laborers Health & Welfare Tr. Fund for N. Cal., 484 U.S. at 544 n.6. In other words, AEELA had to continue paying the Christmas Bonus at the 2016 rate, since that was the *status quo* prior to the expiration of the agreement.

Moreover, AEELA cannot point to the CBA's lapse during December 1 to 20, 2017 as an excuse for its failure to pay the Christmas Bonus pursuant to the CBA. Under Puerto Rico, an employee becomes vested with the Christmas Bonus on September 30 of the year to which the bonus corresponds. See P.R. Laws Ann. tit. 29, § 501 (stating that employees become vested in the bonus after having worked a minimum of hours within the period of October 1 of the preceding year and September 30 of the following year). This same timeframe is adopted by the CBA.

In other words, the lapse of the CBA could only have an effect on the bonus of the following year—2018—and not for 2017, because employees had already been vested in the bonus. Indeed, there is nothing in the record that would indicate that the CBA was

not in effect by September 30, 2017, nor has AEELA alleged that the CBA's lapse had an effect on employees becoming vested in the Christmas Bonuses by September 30, 2017. Further, the CBA's lapse during December 1 to 20, 2017 would have little to no effect on employee's ability to become vested in the 2018 Christmas Bonus, because these three weeks of work would have little to no effect on the amount of hours they would need to work within the period of October 1, 2017 to September 30, 2018. Indeed, there is no indication that AEELA argues as much either.

In sum, because case law maintains the CBA's economic terms and conditions as effective until a successor is chosen, there is no way that AEELA could interpret the CBA in such a way as to permit its reduction of Christmas Bonuses. Further, the record also indicates that the parties' past practices were to grant employees a Christmas Bonus at a rate higher than the legal baseline, which practice AEELA in no way repudiated prior to its unilateral modification. Therefore, there is no basis through which AEELA may argue that its interpretation of the agreement is sound, even less so when the status quo had to be preserved.

ii. AEELA's acts were in bad faith and served to undermine the Union.

AEELA's actions not as an isolated incident, but as part of the parties' ongoing negotiations to adopt a successor to the CBA which provided for the Christmas Bonuses at issue. A series of disparities in AEELA's practices and the context surrounding them prove that its actions were motivated by a desire to undermine the Union.

First, AEELA tendered payment of the Christmas Bonuses on December 15, 2017. This was during the timeframe during which the CBA had lapsed and not yet been

extended (December 1 to 20, 2017). However, in prior years, AEELA would pay the Christmas Bonuses during the week of Thanksgiving which, during 2017, was a timeframe during which the CBA had been in effect. In other words, AEELA conveniently waited until the CBA expired, disregarded past practices,[3] and then alleged that the Christmas Bonuses did not need to be paid pursuant to the CBA, because it had expired.

Moreover, the Supreme Court has held that a conferral or denial of benefits during the pendency of a concerted activity interferes with employees' rights under the Act. NLRB v. Exchange Parts Co., 375 U.S. 405, 409-10 (1964). Furthermore, the unilateral modification of terms already under negotiation are per se in bad faith if made before an impasse. NLRB v. Safway Steel Scaffolds Co. of Ga., 383 F.2d 273, 280 (5th Cir. 1967) (citing Katz, 369 U.S. at 745).

In this case and during the relevant timeframe, the parties had continued negotiating a number of other clauses for the successor to the CBA. Moreover, AEELA never declared an impasse on the Christmas Bonus issue, and never stated that financial hardships made it unable to continue to pay Christmas Bonuses pursuant to the CBA or its predecessors, prior to making such payments. Therefore, as matter of law, AEELA's reduction of the Christmas Bonuses constituted bad faith, since these were subjects of ongoing collective bargaining for which the parties had not reached an impasse.

[3] Although the CBA did not set a deadline for payment of the Christmas Bonus, proven past practice required tendering payment during the week of Thanksgiving.

d. The ALJ did not incorrectly cite or misapply additional case law.

AEELA takes issue with the ALJ's application of board precedent in Wilkes-Barre Gen. Hosp. Co.; San Juan Bautista, Inc., 356 N.L.R.B. 736 (2011); and Hosp. San Carlos, Inc., 355 N.L.R.B. 153 (2010). Moreover, AEELA argues that the ALJ made a passing reference to MV Transp., Inc., but failed to apply the holding therein. However, AEELA's arguments are all without merit.

In Wilkes-Barre Gen. Hosp. Co., the Board found that the employer unilaterally decided to stop paying longevity-based wage increases after the parties' CBA in that case expired. 362 N.L.R.B. at 1216. The Board concluded that this unilateral act was illegal, because the CBA did not contain any language stating what should occur with these increases when the contract expired. Id. at 1217. Therefore, the employer had a statutory obligation to continue to apply this contractual provision. Id. at 1218. This is the same as herein, such that the ALJ's Decision is correctly predicated on this opinion.

Moreover, AEELA's objection to the ALJ's application of San Juan Bautista, Inc. is also meritless. The ALJ cited this case for the purpose of determining what effect Section 501 would have upon Christmas Bonuses provided for by CBAs. In that case, the Board held that regardless of statutory dispositions providing for exemptions from payment of Christmas Bonuses, the employer was required to bargain with the Union prior to modifying the practice of payment thereof. San Juan Bautista, Inc., 356 N.L.R.B. at 742.

AEELA's arguments as to the ALJ's application of Hosp. San Carlos, Inc. are equally deficient. The ALJ also cited this case to see what effects Section 501 would have on Christmas Bonuses paid in accordance with a CBA. There, the parties' CBA

incorporated Section 501's requirement to pay Christmas Bonuses, but also including formulas for the computation of this bonus that exceeded the legal baseline. Hosp. San Carlos, Inc., 355 N.L.R.B. at 158. Because of these formulas and an existing past practice of paying Christmas Bonuses in accordance with these formulas—and not the legal baseline—the Board found that the employer could not unilaterally reduce the amounts of the Christmas Bonuses to the legal baseline, under the argument that the CBA merely incorporated Section 501's benefits. Id. at 159.

Lastly, and with regards to MV Transp., Inc., as argued in Section III(b) hereof, the ALJ correctly analyzed AEELA's waiver arguments. Therefore, no misapplication of law occurred, such that the ALJ's decision must stand.

e. The relief granted by the ALJ in her Decision is appropriate.

In light of the foregoing discussion, the ALJ's Decision in this case, that AEELA unilaterally and illegally modified the terms of the CBA, is correct. Therefore, the relief granted by the ALJ in its Decision, designed exclusively to mitigate and remedy this illegal act, is appropriate and correct.

IV. CONCLUSION

The aforementioned arguments would show that AEELA's exceptions are all unwarranted and must be denied. For starters, the ALJ correctly determined that the Christmas Bonuses were subject to past practice and had become the status quo. Second, the ALJ also properly applied the standard to determine whether waiver occurred and, pursuant thereto, rightfully held that the Union had not waived its right to bonuses.

Lastly, the case law applied in the Decision, and the relief granted therein were done so accurately.

For the foregoing reasons, the Board must adopt the Decision in its entirety as its Order in this case.

RESPECTFULLY SUBMITTED, from Guaynabo, Puerto Rico this 14th day of January 2019.

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